NO. 21539

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RALPH RINZUELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTION AND STATEMENT OF THE CASE

A. PRE-TRIAL AND TRIAL PROCEEDINGS

On June 23, 1965, the Federal Grand Jury for the Southern District of California returned indictment No. 35045 charging appellant in a single count with violation of Title 18, United States Code, Section 2312 - Interstate Transportation of a stolen motor vehicle [C. T. p. 2]. 1/

1/ "C. T." refers to Clerk's Transcript of record.

On June 28, 1965, appellant was arraigned in the United States District Court, at which time an attorney was appointed by the Court to represent the appellant. On the same date appellant entered a plea of not guilty to the charge set forth in the indictment, and the matter was continued to July 19, 1965 for trial setting [C. T. p. 3].

On July 19, 1965, the appellant informed the District Court that he was attempting to employ counsel of his own choice. The Court therefore continued the matter to July 26, 1965 for further proceedings and trial setting [C. T. p. 4].

On July 26, 1965, the case was set for trial on August 31, 1965. On August 31, 1965, jury trial commenced before Honorable Jesse W. Curtis. The appellant was granted permission by the Court to act in pro per with the assistance of appointed counsel. At this time appellant moved the trial court to dismiss the charges for lack of speedy prosecution. The Court denied the motion.

On September 1, 1965, the appellant was found guilty and was sentenced on the same date to the custody of the Attorney General for a period of five years [C. T. pp. 29-31].

On September 7, 1965, appellant filed a timely notice of appeal [C. T. p. 39].

B. POST TRIAL PROCEEDINGS

On November 30, 1965, appellant moved for a reduction of sentence which was denied by the Court [C. T. pp. 41-43].

On December 1, 1965, appellant through counsel moved the trial court for a new trial based on the grounds of newly discovered evidence [C. T. 43-45]. On December 13, 1965 on Motion of appellant's attorney, Motion for New Trial was taken off calendar [C. T. 46].

On December 23, 1965, appellant's counsel renewed the earlier motion for a new trial on the grounds of newly discovered evidence [C. T. p. 57].

On January 3, 1966, a hearing was held on the motion for a new trial and denied by the District Court [C. T. p. 58].

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 2312. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTORY PROVISION

Title 18, United States Code, provides in pertinent part:

> "Whoever transports in interstate . . . commerce a motor vehicle . . . knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III

STATEMENT OF FACTS

The defendant was charged in a one count indictment with transporting a 1964 Ford Motor Vehicle in interstate commerce from Lynn, Massachusetts, to Los Angeles County, California, knowing said vehicle to have been stolen.

Donald Warrington was the first witness called by the appellee. Mr. Warrington testified that on April 4, 1964, he was the night manager of a Mobil Gas Station in Lynn, Massachusetts, which also rented cars. At approximately 11:30 P.M., on April 4, 1964, the defendant entered the gas station and had a conversation with the witness. Mr. Warrington stated the defendant wanted to rent a car to go to New Jersey as his own vehicle had broken down in Gloucester, Massachusetts, where he left his wife and family. Mr. Warrington testified that when he told the defendant what the deposit would be the defendant replied that with the payment of the deposit he would not have enough money remaining to pay for the gas. Therefore, the witness testified he suggested to the defendant that he rent the car on a weekend special whereby he could drive his family to Boston and put them on the train [R. T. pp. 73-76]. 2/

Mr. Warrington was then shown Government Exhibit #2, a Hertz-Rent-A-Car Contract. Mr. Warrington testified that the defendant had identified himself as John Russo [R. T. p. 77, lines

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2/ "R. T." refers to Reporter's Transcript of record.

11-12], which name appeared on the rental agreement. That all of the other information on the rental agreement was provided him by the defendant or was copied from a driver's license furnished by defendant. This information included the number on the driver's license, the name John Russo on the driver's license and the street address, 929 Washington Street, Hoboken, New Jersey [R. T. p. 78, lines 11-25; p. 80, lines 1-3]. The agreement also reflected that the car was rented for a period of only two days and was to be returned on April 6, 1964 [R. T. p. 97, line 1].

A 1964 Ford was then delivered to the defendant. A registration to a 1964 Ford, Government Exhibit #1, had already been identified as reflecting the registration to the vehicle rented defendant, and admitted into evidence [R. T. p. 73, lines 17-25; p. 74, lines 1-3].

Mr. Warrington concluded his direct testimony by stating that when the car was not returned he attempted to contact the defendant at the street address reflected on the agreement and copied from the driver's license presented by defendant, but was unsuccessful as defendant was not known at that address [R. T. p. 79, lines 7-21]. Mr. Warrington further stated he attempted to locate the defendant from information on a business card furnished him by defendant reflecting defendant's association with a finance company. This attempt was also unsuccessful as the company had never heard of a John Russo [R. T. p. 79, lines 22-25; p. 80, lines 1-13; p. 81, lines 9-22].

On cross-examination Mr. Warrington testified that he was

responsible for the Hertz Rent-A-Car business during the evening hours and that he handled phone calls received pertaining thereto [R. T. p. 82, lines 24-25]. Mr. Warrington denied receiving a long distance phone call from the defendant on April 6 or 7th, 1964, from Danbury, Connecticut. Mr. Warrington stated that he usually had Mondays off and if a call relating to a rented car was received, it would be noted on the contract by his Monday night replacement [R. T. p. 84, lines 6-25]. Warrington testified that because the car was supposed to be returned on Monday, April 6, 1964, his day off, and was not received, he consulted his replacement on his return and the replacement informed him that he had not received any phone call relating to the car or heard from any customer [R. T. p. 89, lines 2-12].

On redirect examination, Mr. Warrington testified that it was the usual business practice to make a notation on the rental agreement of any change in the contract [R. T. p. 91, lines 17-25]. He further testified that when defendant first said he wanted to go to New Jersey, Mr. Warrington wrote down Jersey City, New Jersey, as the turn-in point; then when defendant said that he did not have enough money, Mr. Warrington crossed out Jersey City [R. T. p. 92, lines 10-19].

Mr. Warrington also testified that according to the rental agreement the car was to be returned on April 6, 1964 [R. T. p. 97, lines 1-2], that the car was maroon with a black interior [R. T. p. 102, lines 11-13], and that the maroon color was dark, at times looking almost black [R. T. p. 105, lines 11-12]. Mr.

Warrington further testified that Government's Exhibit No. 1, registration for a vehicle, was the registration for the vehicle rented to defendant.

Appellee's second witness was Emily G. Emery, who testified that she lived at 929 Washington Street, Hoboken, New Jersey, the address on the driver's license shown to Mr. Warrington on the night the car was rented [R. T. pp. 78-79], and that she has lived there and owned the house 25 years [R. T. p. 106, lines 15-25]. Mrs. Emery then testified that defendant did not live at that address and never has, that no one named John Russo or John Rinzuella had ever lived there, and that she had never before seen the defendant [R. T. p. 107, lines 9-22].

The Government next called Mrs. June Strelecki. Mrs. Strelecki testified that these were photographs she had brought with her of an IBM tape recording of two expired New Jersey licenses issued to a John Rinzuella of Hoboken, New Jersey. The licenses had expired in June, 1963. Exhibits 3 and 4 were then admitted into evidence.

The Government's fourth witness was Mr. John Chavez. Mr. Chavez testified that he knew the defendant in Los Angeles, California, as John Russo, and that defendant had worked for him until approximately a month prior to defendant's arrest [R. T. p. 115, lines 1-16]. Mr. Chavez further testified that he had met defendant in 1963 or 1964 in Los Angeles and that defendant had a black Ford at that time [R. T. p. 115, lines 7, 8, 19-24]. Defendant at that time had told Mr. Chavez that he was making payments on

the car [R. T. p. 116, lines 18-20].

On cross-examination, Mr. Chavez testified that defendant's car did not have California license plates, but that the license plates were either New Jersey or Massachusetts [R. T. p. 119, lines 9-15].

Mr. Chavez was then called as a defense witness, and testified that one day defendant no longer had the car; Mr. Chavez could not recall when this occurred. At the time, defendant told Mr. Chavez that defendant and his wife had separated and that she had left with the car [R. T. p. 122, lines 6-20]. Mr. Chavez testified that the defendant seemed to be upset about this occurrence [R. T. p. 123, lines 7-10].

The Government then called Miss Bernardine Blacic as its fifth witness. Miss Blacic testified that she was acquainted with the defendant in Los Angeles, California as John Russo in June, 1964, and that he had at that time a new black Ford with red interior and Massachusetts license plates [R. T. pp. 125-26]. Miss Blacic testified she had seen defendant's car when he came to her home in Redondo Beach, California [R. T. p. 131, lines 16-20].

Miss Blacic was then called as a defense witness. She testified that a week or two after she saw defendant's car, defendant called her and asked for a ride because he had no car, and he seemed very upset [R. T. p. 129, lines 7-25]. She further testified that when she picked him up, defendant told her that his wife Tracy had left him and had taken the car [R. T. p. 130, lines 9-16]. Defendant appeared to be shocked by Tracy's leaving [R. T. p. 131,

lines 1-4].

The Government's sixth witness was Special Agent James N. Ryan, of the Federal Bureau of Investigation. Agent Ryan testified that on July 21, 1964, he examined a car at the Los Angeles Police Department. It was a 1964 black Ford Galaxie 500 with red interior, bearing Massachusetts license number L46494 and serial number 4E64C112468. Agent Ryan was shown Exhibits 1 and 2 (the Massachusetts registration and the rental agreement), and he stated that the car he examined was the same car as was identified in both Exhibits [R. T. p. 134, lines 1-13].

On cross-examination, Agent Ryan testified that he was told by the Los Angeles Police Department that the car had been abandoned on a street in Hollywood, California on approximately July 20, 1964 [R. T. p. 135, lines 8-10; p. 137, lines 13-20]. He further testified that Hertz employees had already cleaned the car when he examined it, so that nothing in the way of papers of any evidentiary value was obtained from the car [R. T. p. 137, lines 5-8].

The Government's seventh and final witness was Special Agent Thomas H. Thornton of the Federal Bureau of Investigation. Agent Thornton testified that he interviewed defendant at the Santa Barbara Police Department on June 10, 1965, in the presence of Special Agent Riley L. Millard of the Federal Bureau of Investigation [R. T. p. 138, lines 16-24]. After advising defendant of his rights to remain silent, to have counsel, and to have counsel appointed by the Court, Agent Thornton told defendant that a federal

complaint against him was outstanding in Los Angeles, alleging interstate transportation of stolen motor vehicle from Lynn, Massachusetts, to Los Angeles, California [R. T. p. 139]. Agent Thornton further testified that during this interview, defendant admitted renting the car under the name John Russo [R. T. p. 140, lines 6-9]. Defendant told Thornton that he had gotten the car to look for work in Gloucester, Massachusetts, but failing to find work there, he had decided two days later to leave Massachusetts [R. T. p. 140, lines 10-16].

Defendant then told Thornton that he had called the Hertz office in Lynn, Massachusetts, and requested a two-day extension on the car rental. Defendant stated that he made this request because he thought two days would be sufficient time for him to leave Massachusetts without being caught [R. T. p. 140, line 17 to p. 141, line 1]. Defendant further stated that he had driven the car through several states [R. T. p. 141, lines 2-6]. On cross-examination, Agent Thornton testified that defendant refused to sign any written statement [R. T. p. 145, lines 17-22].

The Government then rested [R. T. p. 148, line 17]. Defense motions for acquittal on the grounds that the Government had failed to establish the corpus delecti were denied [R. T. pp. 148-151].

The defense then called its first witness, Terrence L. Hofmann. Mr. Hofmann testified that he knew defendant in Los Angeles, California as John Russo both socially and in business, having worked under defendant [R. T. pp. 152-153]. He further

testified that in May or June of 1964 defendant had a dark maroon Ford, which he had seen twice, at least on one occasion, parked in front of the witnesses' house in Hermosa Beach, California [R. T. p. 153, lines 13-20]. The car did not have California license plates [R. T. p. 154, lines 2-4]. Mr. Hofmann also testified that he had learned from defendant about his wife's having left with the car and the children, and that defendant was unhappy about it [R. T. p. 154, lines 5-23]. Finally, Mr. Hofmann testified that he had not seen the car, defendant's wife or the children after that time [R. T. p. 155, lines 2-4 and 21-23].

As its second witness, the defense called Mrs. Emily G. Emery, of Hoboken, New Jersey, who had previously testified for the Government. Mrs. Emery testified that she had never before seen defendant [R. T. p. 157, lines 21-24], but that she knew a Tracy Hudson. Tracy Hudson had lived on River Street in Hoboken, New Jersey; she had two small children, an infant and a two-year old; this had been two years ago; and Tracy Hudson had worked for Mrs. Emery and had known Mrs. Emery's home address, 929 Washington Street, Hoboken, New Jersey [R. T. pp. 158-159].

The defense then called as its third and final witness John Rinzuella, the defendant. The defendant testified that he had been convicted of a felony in New Jersey and had been put on parole in 1962 [R. T. pp. 160-167]. He left New Jersey in March, 1964, with Tracy Hudson (Tracy Russo) and her two children, in violation of parole [R. T. p. 162]. He decided to leave in order to avoid mingling with "people of ill repute or ex-convicts" [R. T. p. 164,

lines 1-5]. From New Jersey, defendant went to Massachusetts [R. T. p. 164, lines 6-9]. Defendant had difficulty finding work in Massachusetts [R. T. pp. 164-167], and then decided to get a rented car [R. T. p. 167, lines 14-15]. Defendant testified that he rented the car from Mr. Warrington in Lynn, Massachusetts, using the name John Russo because he had no identification under his real name [R. T. pp. 169-170]. He used a driver's license given to him by Tracy Hudson, and admitted knowing that the license was not genuine [R. T. p. 170, lines 9-25]. Defendant denied having told Mr. Warrington that his car had broken down [R. T. p. 173, lines 18-23].

Defendant then related his subsequent travels in the Hertz car with Tracy Hudson and the children. The morning after the car was rented they went to Bangor, Maine [R. T. p. 174]; from there to Portsmouth, New Hampshire [R. T. p. 175]; and then to Danbury, Connecticut [R. T. pp. 175-176]. Defendant testified that while in Danbury he called the Hertz agency in Lynn, Massachusetts, from a pay phone in a supermarket, sometime within 72 hours after having rented the car. He testified that during this call he requested a 10-day extension, and was told that he could have the extension and could drop off the car at any Hertz office [R. T. pp. 176-179].

After the phone call, defendant testified, they drove to Aurora, Illinois [R. T. pp. 179-180], and to Kansas City [R. T. pp. 180-181]. From Kansas City, they drove to Carmel, California [R. T. p. 184], and finally to Los Angeles, California [R. T. p. 186, lines 1-5]. Defendant ended his travels with the car in Inglewood,

California, at the end of May, 1964 [R. T. p. 186, lines 13-25].

During all of these travels, defendant testified that they had used major freeways [R. T. p. 185, lines 1-7], had registered in motels under the name John Russo [R. T. p. 183, lines 3-7], and had done nothing to disguise the car [R. T. p. 182, lines 10-14].

After arriving in Inglewood, defendant got a job working for Mr. Chavez, and worked for 14 months [R. T. p. 187, lines 4-24]. Then, one morning, about two months after renting the car, defendant woke up about 7:00 in the morning to find that Tracy, the children, their luggage, and the car were gone [R. T. p. 192]. But he did not report the car as stolen because of his parole violation [R. T. p. 194, lines 17-23]. In all this time he had never sent Hertz a forwarding address or any money [R. T. p. 195, lines 14-18]. Defendant testified that the car was black with maroon interior [R. T. p. 196, lines 23-24].

Defendant then testified that he had arrived in Los Angeles about June 10, 1964, and that Tracy took the car about June 23, 1964 [R. T. p. 206]. He testified that he had not turned the car in to Hertz because he needed it for his job and did not have enough money to pay what was due [R. T. p. 207, lines 1-9]. He further testified that after the car disappeared, he bought a new Corvair and made payments on it. However the Corvair was subsequently repossessed because of his lack of credit [R. T. pp. 213-214].

On cross-examination, defendant admitted knowingly giving a false address to the Hertz agency in Massachusetts [R. T. p. 223, lines 7-10]. For the first time during his testimony defendant

claimed to have called Hertz in Kansas City to ask about keeping a car longer than the rental period on the contract; defendant claims to have been told that he could turn in the car at any office and simply pay the appropriate charges [R. T. p. 244].

On redirect, defendant testified in explanation of his nervous demeanor on cross-examination that he had recently had an operation, had lost 25 pounds, and was in constant pain [R. T. pp. 259-260].

The Government then called John Hester, the owner of the gas station in Lynn, Massachusetts, as a rebuttal witness. Mr. Hester testified to the usual business practice of making notations of changes on the Hertz rental contracts, and to the fact that no record of any change in defendant's contract could be found [R. T. pp. 261-262]. On cross-examination, Mr. Hester could not recall who would have relieved Mr. Warrington on his night off [R. T. pp. 264-265].

As a second rebuttal witness, the Government called Special Agent Riley L. Millard of the Federal Bureau of Investigation. Agent Millard testified that he had been present when defendant was interviewed at the Santa Barbara Police Department by Agent Thornton [R. T. p. 269]. Agent Millard's testimony supported Agent Thornton's prior testimony as to what occurred at that interview [R. T. pp. 270-281].

QUESTIONS PRESENTED

I THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

A. There Was Sufficient Evidence To Establish the Corpus Delicti.

B. There Was Sufficient Evidence of Scienter.

II THE PROSECUTING ATTORNEY COMMITTED NO ERROR IN CLOSING ARGUMENT.

A. This Issue Cannot Be Raised Here For the First Time.

B. The Prosecuting Attorney Committed No Prejudicial Error.

III THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO REOPEN AND FOR NEW TRIAL.

A. The Motion to Reopen After Both Sides Rested.

B. The Motions to Reopen and For New Trial Based On New Evidence.

IV CONCLUSION

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION

When dealing with questions of the sufficiency of the evidence to sustain a conviction, the reviewing court must consider the evidence in the light most favorable to the Government.

Glasser v. United States, 315 U.S. 60 (1942);

Papadakis v. United States, 208 F.2d 945 (9th Cir. 1954);

Barnard v. United States, 342 F.2d 309, 317 (9th Cir. 1965), cert. denied 382 U.S. 948 (1965), reh. denied 382 U.S. 1002 (1966);

Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964).

A. There Was Sufficient Evidence to Establish the Corpus Delicti.

Viewed in the light most favorable to the Government, the evidence establishes that the Hertz Company owned a black 1964 Ford, serial number 4E64C112468, bearing Massachusetts license L46494. Both the serial number and the color appear on the Massachusetts registration, Government's Exhibit No. 1. Secondly, the defendant rented this same car from Mr. Warrington in Lynn,

Massachusetts; the rental contract, Government Exhibit No. 2, signed by defendant, contained a description of the car as a 1964 Ford sedan bearing Massachusetts license L46494. Third, the car found in Hollywood, California, was a black 1964 Ford, serial number 4E64C112468, bearing Massachusetts license L46494, according to the testimony of Agent Ryan. Finally, defendant admitted renting a black Ford from Mr. Warrington and driving it across country to Los Angeles [R. T. pp. 168-186].

Appellant points to two defects in this evidence: first, that the serial number of the car rented to defendant was not proved; and second, that Mr. Warrington testified that the car was dark maroon rather than black. These two discrepancies do not, as appellant contends, bring the case "squarely within the rule" of Tyler v. United States, 323 F.2d 711 (10th Cir. 1963). In Tyler, the only evidence was the year and make of the car; here, in contrast, we have the serial number, the license plate, and the color, make, model and year of the car established both in Massachusetts and in California, plus the defendant's own admissions in Court. As the Tyler court itself has paid, "identification by serial number is not required when other competent evidence establishes that the car stolen and the car found in another state are one and the same". Welch v. United States, 360 F.2d 164, 165 (10th Cir. 1966).

Nor is the dispute over color very weighty. Mr. Warrington's testimony, of a "dark maroon" car, concerned a transaction that occurred in the middle of the night [R. T. p. 168]; moreover,

dark maroon could appear to be black under certain lighting conditions. All other witnesses and Exhibits agree that the car was black. In a similar case, the Seventh Circuit found that when the car stolen was said to be green and all other witnesses said the car was light blue, the variance was "too trivial for discussion". United States v. Perry, 324 F. 2d 871 (7th Cir. 1963).

B. There Was Sufficient Evidence of Scienter.

The jury must determine the issue of defendant's intent from the totality of circumstances surrounding the taking of the car and the interstate transportation thereof. Viewed in the light most favorable to the Government, there was abundant evidence supporting the jury's determination of guilt. Defendant knowingly used false pretenses in renting the car. Although familiar with car rental procedure, defendant immediately left the state with the car, in violation of the contract. Although the defendant claimed to have gotten an extension by telephone, there was conflicting testimony on this point; the jury's verdict has conclusively determined this factual question adversely to defendant.

Defendant relies heavily on his claimed intention to return the car at some later date, and the impossibility of doing so because of the car's disappearance. However, the jury's verdict must be taken to mean that defendant formed such an intent subsequent to the interstate transportation, if at all. As this Court has

pointed out, even an actual subsequent return of the car, past the due date, would not negative the original intent. Jarvis v. United States, 312 F.2d 563, 564 (9th Cir. 1963).

II

THE PROSECUTING ATTORNEY COMMITTED NO ERROR IN CLOSING ARGUMENT.

A. This Issue Cannot Be Raised Here For the First Time.

A search of the record fails to disclose that appellant objected at trial to either of the alleged errors in the argument to the jury. As stated in White v. United States, 315 F.2d 113 (9th Cir. 1963), cert. denied 375 U.S. 821 (1963), at page 116:

> "But even had there been a taint of unfairness or prejudice, no voice was raised in protest - no objection ever raised - no chance given the trial court to cure any alleged error. This is a complete waiver."

See also:

Orebo v. United States, 293 F.2d 747 (9th Cir. 1961), cert. denied 368 U.S. 958 (1962);

Patterson v. United States, 361 F.2d 632 (8th Cir. 1966).

B. The Prosecuting Attorney Committed No Prejudicial Error.

Even if the issue could now be raised, there was no prejudicial error in the argument. It is well-settled in the Ninth Circuit that a prosecutor may state to the jury his belief that a witness is lying, without violating the rule of Berger v. United States, 295 U.S. 78 (1934).

Williams v. United States, 265 F. 2d 214, 217 (9th Cir. 1959);

Hallinan v. United States, 182 F. 2d 880, 885 (9th Cir. 1950).

Secondly, the alleged misstatement of the evidence was hardly prejudicial. Even the two-day or ten-day extension appellant claims to have gotten by telephone would not establish his innocence. Moreover, this single statement by the prosecuting attorney is a far cry from the "pronounced and persistent" misconduct in the Berger case, where the Court was constrained to find "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential". 295 U.S. 78 at page 89. This is not a case where the attorney's misstatement, for example, means the difference between a strong abili and no alibi. Corley v. United States, 365 F. 2d 884 (D.C. Cir. 1966). Where there is no substantial prejudice shown, the appellant is not entitled to a reversal. Cross v. United States, 353 F. 2d 454 (D.C. Cir. 1965).

III

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS TO RE-OPEN AND FOR NEW TRIAL.

A. The Motion to Reopen After Both Sides Rested.

Reopening a criminal case after both sides have rested is entirely within the trial court's discretion.

Fernandez v. United States, 329 F. 2d 899 (9th Cir. 1964), cert. denied 379 U.S. 832 (1964);

Wolcher v. United States, 218 F. 2d 505 (9th Cir. 1955), cert. denied 350 U.S. 822 (1955), reh. denied 350 U.S. 905 (1955);

Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946);

Reining v. United States, 167 F. 2d 362 (5th Cir. 1948), cert. denied 335 U.S. 830 (1948);

Henry v. United States, 204 F. 2d 817 (6th Cir. 1953);

Maupin v. United States, 225 F. 2d 680 (10th Cir. 1955).

It has been said that the Court must be very reluctant to permit a reopening because of the undue emphasis such a procedure places on the evidence in the minds of the jury.

Eason v. United States, 281 F. 2d 818

(9th Cir. 1960);

United States v. Bayer, 331 U.S. 532 (1947).

At the very least, defendant must show a reasonable excuse for the untimeliness of the evidence.

Eason v. United States, supra;

United States v. Boyer, supra.

In the instant case, defendant made no excuse for the untimeliness [R. T. p. 284]. Moreover, the further evidence offered was merely an additional denial by the defendant of the testimony of the two F. B. I. agents who interviewed him. It is submitted that there clearly was no abuse by the trial court of its wide discretion in this matter.

B. The Motions to Reopen and For New Trial Based on New Evidence.

A motion for new trial based on newly discovered evidence is also addressed to the discretion of the Court. Denial of such a motion may be overturned only on a showing of clear error or abuse.

Maldonado v. United States, 325 F. 2d 295

(9th Cir. 1963);

Beyda v. United States, 324 F. 2d 526

(9th Cir. 1963);

Maldonado v. United States, 310 F. 2d 84

(9th Cir. 1962).

There are five requirements which must be met for such a motion to succeed. The evidence must be (1) newly discovered, (2) after diligence on the part of counsel failed to produce the evidence at trial; (3) the evidence must not be merely cumulative or impeaching, but (4) material to the issues; and (5) it must be such that it would probably produce an acquittal.

Beyda v. United States, supra, p. 531;

Pitts v. United States, 263 F.2d 808 (9th Cir. 1959), cert. denied 360 U.S. 919 (1959);

Brandon v. United States, 190 F.2d 175 (9th Cir. 1951).

It cannot be effectively argued that the existence of a witness and the purported testimony of such person known to appellant prior to trial is "newly discovered" evidence. It is uncontested that appellant was both aware of the existence of the witness, Tracy Hudson, and of her anticipated testimony prior to trial [R.T. p. 324, lines 5-25; p. 325, lines 1-3].

Similarly, it cannot be strenuously contended by appellant at this time that the presence of this witness was vital to his case. A careful review of the record failed to reflect any pre-trial motion on the part of appellant to gain a continuance of the matter to allow further search for the witness; nor the existence of any statements by appellant, made to the Court, that this witness was material to his defense. This is further borne out by an examination of the nature of the proffered new testimony; all of the proffered testimony, except that dealing with Tracy Hudson's activities after leaving

defendant, would be of facts and circumstances already known to defendant and testified to by him; we submit that such evidence fails all of the requirements set forth in Beyda, supra.

As to the remaining part of the proffered new testimony, dealing with Tracy Hudson's activities subsequent to her leaving defendant, the only issue in the case to which this would be relevant is whether the car found was the same car as was stolen. And, it is submitted, the proffered testimony supports the Government on this issue. It can hardly be said that this evidence would "probably produce acquittal".

It is clear, then, that the trial court's denial of these motions was not an abuse of discretion, but rather was clearly correct.

IV

CONCLUSION

For the reasons given above, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

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